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COVENANTS AS QUASI CONTRACTS

IT is the scope of this article to discuss briefly certain forms of covenant with a view to determining whether in their nature they are contractual or quasi contractual.

Quasi contract may be defined as an obligation whereby one person becomes bound to another, without regard to his consent, by a legal tie similar to that arising from contract. It may exist either by statute or by common law, and, if by the latter, it may be enforced either on principle or by reason of custom. As to the cause of the obligation, it may be imposed upon a man because he occupies a peculiar relation, public or private, or because of his acts or omissions. And since agreement or the semblance of one is not an element of the obligation, it may arise where the person bound was unconscious or undesirous of assuming any liability whatever, or where he was desirous of assuming a different liability from that imposed.¹

It is generally said that agreement is a necessary element of contract. This statement is subject to exception from a historical standpoint, but so far as the modern law of contract is concerned, it is sufficiently accurate for ordinary purposes. It is not however a rule of universal application. Excluding from consideration certain forms of mistake, fraud, and coercion which prevent the formation of a contract, all that the law requires in this respect to make a contract is the semblance of an agreement. If a person so speaks or acts as to lead a reasonable man to believe that he makes or assents to a particular proposition, it constitutes in law an offer or an acceptance, as the case may be, and a contract may result in spite of any mental reservation or secret dissent.² So if a man in entering into an apparent agreement uses words which express a meaning different from his actual intent, a contract ordinarily arises in spite of that difference. Having the power to choose his words, he is held to the true meaning of those he adopts.³ In each case he is bound by a principle of estoppel, supplemented sometimes by a rule of interpretation or construction. The distinction between contract and quasi contract is, therefore, that in

¹ See Keener, *Quasi Contracts*, Ch. 1.

² Holland, *Juris.* 228-234; Hammon, *Contracts*, pp. 8, 58, 100, 106, 110, 120.

³ Hammon, *Contracts*, pp. 783, 813.

the one there is an agreement or the semblance of an agreement, while in the other there is neither.

It has just been said that the liability imposed on a party by rule of interpretation or construction is contractual, not quasi contractual. Distinguishable from this liability is that attached by law, not to the words employed in making an agreement, but to the relation created by those words. If a man has promised to convey certain "land," he is bound to convey the house on it even though he actually intended otherwise, since this is the meaning of the word used.¹ If a man enters into the marriage contract and wrongfully neglects his wife, he is chargeable as upon contract for necessities furnished her even against his dissent, since this liability attaches to the marriage relation.² In the first case the liability is contractual because it grows out of the use of particular words creating the semblance of an agreement. In the second case it is quasi contractual since it arises, not from any particular words that may have been used in the contract of marriage, but from the existence of the relation created by that contract. It may therefore be said that in all cases the liability imposed upon a promisor by rules of interpretation or construction is contractual, not quasi contractual.

Speaking first of contracts in general, they are either express or implied. Express contracts are those arising from an agreement or the semblance of an agreement reached by the use of words, and words alone, whether oral or written. Implied contract (excluding the so-called contract implied in law, which is not a contract) are those arising from an agreement or the semblance of an agreement inferred either from conduct alone or from conduct in connection with words incomplete in themselves as the expression of an agreement. It thus appears that where the parties reach an agreement or the semblance of one by the use of words alone, the contract is in all cases express.³

It is in this sense that the terms express and implied are generally used in the law of contract. Yet we frequently find mention of a third class described as contracts implied from express words. This class of contracts is usually found in the law of conditions, warranties, and covenants.⁴ Covenants thus said to be implied from

¹ Warvelle, *Vendors*, § 9.

² Keener, *Quasi Contracts*, 22; and see *Read v. Legard*, 6 Ex. 636; *Cunningham v. Reardon*, 98 Mass. 538.

³ Hammon, *Contracts*, pp. 16, 25, 54.

⁴ Bishop, *Contracts*, §§ 28, 239-256; Keener, *Quasi Cont.*, 241.

express words are termed covenants implied in law, or covenants in law, or, more often, implied covenants simply. These do not correspond with the implied contract, which, as has been said, is inferred from conduct alone or from conduct in connection with words incomplete in themselves as the expression of an agreement. On the contrary they arise where the parties have used for a definite purpose, to which the court gives effect, particular words which have in law a further and secondary meaning not necessarily in the contemplation of the covenantor. Consequently, viewing covenants as contracts, we have two kinds of express covenant,—express in a strict sense and covenants based on express words and yet termed implied.¹

Where the parties have employed particular words in a transaction, the meaning may be obvious or it may be more or less obscure or ambiguous. In either event the court is called upon to ascertain their meaning and effect, and this process of ascertainment is termed interpretation and construction. When the court concludes that the parties intended to enter into a covenant of a certain nature, and goes no further, the covenant thus declared is express in the strict sense, the same as if the meaning were perfectly obvious without conscious resort to interpretation or construction. Where, however, a party has employed words in a generally accepted meaning, and the court not only gives effect to those words in that sense but also imposes on the party a further and secondary obligation attached by law to those words, this obligation, if it amounts to a covenant, is termed an implied covenant. While it is termed implied in the law of covenants, yet in the terms of general contract law it is express, since it is derived directly from express words chosen by the covenantor.

It is easy to see the distinction in theory between the two sorts of covenant thus defined,—express covenants in the strict sense and covenants implied by law from particular words; and in reference to some covenants at least a practical reason for the distinction now exists.² But so far as their nature goes, as to whether contractual or quasi contractual, a line cannot be drawn between them. That express covenants in the strict sense are contracts, no one would dispute; and the nature of implied covenants would seem to be the same. If there is a distinction in nature between express and implied covenants, it would seem to rest on the fact that express

¹ *Williams v. Burrell*, 1 C. B. 402, 429.

² *Tiffanv. Real Prop.*, pp. 95, 107-109.

covenants are derived from the primary meaning of the words employed by the parties, while implied covenants are derived from a secondary and legal meaning of words whose primary and natural effect is not to create a covenant. But this fact neither seems to afford a ground for regarding implied covenants as quasi contracts. The process of the court in determining the meaning and effect of a doubtful word is precisely the same whether the word is vernacular or legal. The only difference is that in one case the court turns to Webster, while in the other it turns to Bouvier. It may be conceded that in the case of an implied covenant, the meaning of the words creating it being a secondary and legal one as distinguished from the primary and natural sense, it cannot always be supposed that the covenantor was conscious of entering into the covenant. But this merely invites inquiry into the actual intent of the covenantor, and, as we have seen, his actual intent is immaterial. If a party uses words of definite meaning, he is bound in contract by that meaning. The rule is precisely the same whether the words are legal or vernacular. In each case, whether the covenant is express or implied, the covenantor has used words which have a definite meaning and effect, and there is therefore the semblance at least of an agreement, which is all that the law requires in this respect to make a contract.

This discussion may be given point by a few illustrations. The covenant to pay rent arising from the words "yielding and rendering" rent imposes a contractual liability, not quasi contractual, since it arises from the use of words whose meaning and effect is a promise to pay. Whether or not the lessee intended so to promise is immaterial so far as the nature of the covenant is concerned, since by employing the words in question he entered into the semblance of an agreement to pay, and this semblance is what makes a contract. In the terms of general contract law, this covenant is express, since it arises from the use of particular words. Considered as a covenant, however, there exists a conflict of authority as to whether it is express or implied. The question is one of practical importance, in the absence of a separate promise in terms to pay rent, since if the covenant is express, the lessee is still bound to his lessor for the rent, notwithstanding an assignment of the term, while it is otherwise if the covenant is implied.¹ In reason it would seem that the covenant to pay rent is the natural meaning and effect of the words "yielding

¹ Rawle, *Covenants*, § 272, note 5; *Tiffany, Real Prop.*, pp. 95, 107-109.

and rendering," considering the context, and some courts so hold.¹ Other courts however take a contrary view and regard the covenant as implied.² So far as the nature of the covenant is concerned, however, this question is of no importance. It concerns the form alone. In whichever light the covenant is regarded, it is a contract, not a quasi contract, since it arises, not merely from the relation of landlord and tenant, but from the use of particular words of definite meaning and effect which create the semblance of an agreement.

The covenant of quiet enjoyment implied from the word "let," "lease," or "demise,"³ and the covenants implied from the word "grant," "bargain," "sell," or "convey,"⁴ impose a liability which arises from the use of words, and words alone, and therefore in the terms of general contract law each is express. As the term express is used in the law of covenants, however, these covenants are implied, since they are founded on a rule of interpretation and construction which gives to the words in question, not only their primary meaning and effect as creating an estate, but also a secondary and legal meaning and effect as covenants. These covenants, like the covenant to pay rent, are contracts, not quasi contracts, since they arise from the use of words which make the semblance of an agreement, and they are attached to those words themselves, not merely to the relation thereby created.

The covenant of quiet enjoyment arising from the relation of landlord and tenant⁵ does not rest on the use of particular words, so that it is not express in any sense of the word. In reference to its nature, it may perhaps be regarded in either of two lights. It may be said, first, that when a man lets premises to be occupied, it is only a natural inference from the fact of leasing that he intends that the lessee shall quietly enjoy the premises. On this theory the covenant is a contract, since there is the semblance of an agreement arising from his conduct. The fact that the lessor may not in reality have intended to covenant and that he is nevertheless held to have done so does not militate against the idea that the obliga-

¹ Tiffany, *Real Prop.*, p. 95; 1 Taylor, *Land. and T.* (8th ed.) § 252, note 3; Newton *v.* Osborn, *Style*, 387 (semble); Porter *v.* Swetnam, *Style*, 406, 431 (semble).

² Rawle, *Covenants*, (5th ed.) § 272, note 5; Harper *v.* Burgh, 2 Lev. 206 (semble); *Iggulden v. May*, 9 Ves. 325 (semble); *Fanning v. Stimson*, 13 Iowa, 42 (semble); *Kunckle v. Wynick*, 1 Dall (Phil. C. P.) 305, 307 (semble); *Kimpton v. Walker*, 9 Vt. 191.

³ Tiffany, *Real Prop.* p. 96; Rawle, *Covenants* (5th ed.) §§ 270, 272.

⁴ *Stimson*, *Am. St. Law*, § 1501; Rawle, *Covenants* (5th ed.) §§ 285-287.

⁵ Tiffany, *Real Prop.* p. 96; Rawle, *Covenants* (5th ed.) § 274.

tion is a contract, since as we have seen all that the law requires in this respect to make a contract is the semblance of an agreement. In this light the covenant is a contract implied in fact. On the other hand it may be said that a covenant of quiet enjoyment is not a natural inference from the fact of leasing, and therefore there is not the semblance of an agreement to that effect, so that the covenant imposed upon the lessor is a quasi contract. This latter view is probably the better one, for this covenant is usually regarded as arising from the relation of landlord and tenant created by the lease rather than from the mere fact of leasing.

The same difficulty arises in determining the nature of the warranty of title implied on a sale of goods. It too may be regarded in either of two lights. The sale does not create a subsisting legal relation between the parties, however, so that the warranty cannot be regarded as arising out of a legal relation as distinguished from particular words or conduct. In reason, perhaps, the warranty should be regarded as a contract implied in fact from the sale of goods in possession. The fact of sale would seem of itself to require an inference that the seller asserts that he is the owner of the property.¹ On this theory, the warranty is contractual, not quasi contractual.

The warranty arising on compulsory partition² is not express in any sense of the word, since it does not rest on the use of particular words. As to its nature, it is a quasi contract, since it originates immediately in a rule of law, prescribed either by the common law or by statute, and does not depend upon agreement or the semblance of one.

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¹ See Benjamin, *Sales* (Bennett's ed.) pp. 621, 672.

² Tiffany, *Real Prop.* p. 404; Rawle, *Covenants* (5th ed.) § 277.